



We appreciate the request from members of the drafting Committee to expand on our letter to the Uniform Law Commission commissioners enumerating our objections to the draft act that was presented at the meeting in July. We understand the goal of the drafting Committee and the ULC in drafting a civil cause of action for those injured by distribution of their nude images without consent, but any draft act must also comply with First Amendment protections for the publication of lawful images. Unfortunately, the present draft does not. Rather, it creates a remarkably broad cause of action against anyone who discloses, even unintentionally, a nude image without affirmative consent of the depicted person—even when there is no proof of harm.

In short, the draft act has no meaningful safeguards to tailor its reach to those who knowingly and maliciously invade another's privacy. For that reason, the draft act in its present form is unlikely to survive judicial scrutiny. Many of the constitutional infirmities in the draft bill discussed below were the basis of a 2014 constitutional challenge to an Arizona "revenge porn" statute. *Antigone Books LLC v. Brnovich*, 2:14cv02100 (D. Ariz.). That case resulted in a consent decree in which the court found plaintiffs to be the prevailing parties, permanently enjoining the statute. *Id.* (Final Decree dated July 10, 2015).

Once First Amendment scrutiny is triggered—as it is here by the draft act's selective punishment of certain images—the burden of justifying the specific text and breadth of a statute lies entirely with *the government*. That means that part of the ULC's job should be to provide states with model statutory language that is carefully drafted to meet the government's compelling interest, which burdens no more speech than necessary to accomplish that goal, and which, critically, will survive judicial review. As noted above, the only federal court to have evaluated a recent "revenge porn" law found it facially unconstitutional. This Committee should therefore be on notice of the importance of getting the text of this draft act just right, to ensure that any protections provided by the model tort will outlast the inevitable constitutional review.

Summary of the Draft Act

The cause of action is defined in section 3(a), which contains three elements. First, the image must depict a person in a state of nudity or engaging in sexual activity. Second, the image must be disclosed without the affirmative consent of the person in the image. Consent is defined as "affirmative, conscious and voluntary authorization." The draft Official Comment explicitly states that silence or lack of protest cannot be considered consent. Third, the person in the image must be identifiable from the image, or from the image and "identifiable characteristics" displayed with the image. (The draft act does not clarify how or by whom the characteristics could be identified.) There is no intent element, malicious or otherwise, required in the disclosure.

Section 3(b) of the draft act provides that a person is not liable under certain conditions. These conditions are affirmative defenses, which put the burden on the defendant to prove. The first affirmative defense is 3(b)(1), which provides that an individual is not liable if the picture was created under circumstances in which the person in the image had no reasonable expectation it would remain private.

Section 3(b)(2)(A) is the second affirmative defense; it exempts any disclosure “made in the public interest.” This defense is further limited by saying that an image’s depiction of a public figure does not make its disclosure in the public interest. Also the draft act can be read as requiring the motivation for the disclosure to be the public good, since the disclosure must be made in the public interest.

Finally, the draft act allows anyone “aggrieved by” the publication of the image to bring a suit against a publisher. Whatever this vague standard means, it goes far beyond allowing the person in the photographic image (or his or her guardian or estate) to seek compensation for harm to the depicted person.

We believe the Committee can and should write a narrower law that will allow people who have suffered harm to sue for damages without broadly threatening the publication of images or speech protected by the First Amendment.

First Amendment Analysis

Content-Based Regulation of Speech is Subject to Greater Constitutional Scrutiny

The draft act singles out a particular type of content for liability—images that depict nudity or sexual activity—and is therefore a content-based regulation of speech. See *United States v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting display of certain images is content-based); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 811 (2000) (“The speech in question is defined by its content; and the statute which seeks to restrict it is content based.”).

Unauthorized Disclosure of Intimate Images Does Not Fit Within a Historical Exception to the First Amendment

The first step for courts in reviewing the constitutionality of a content-based restriction on speech is to determine whether the speech fits in a historical exception to the First Amendment. The draft act does not fit into any of the exceptions articulated by the Supreme Court. There are only a few historic exceptions and they are construed narrowly. As the Court explained in *Stevens*:

'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' These 'historic and traditional categories long familiar to the bar'—

including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'

559 U.S. at 468 (internal citations omitted). See also, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). A small subset of nude images may fit into the historic exceptions for obscene material as defined in *Miller v. California*, 413 U.S. 15 (1973) and child pornography as defined in *New York v. Ferber*, 458 U.S. 747 (1982). However those images are already illegal under federal and state criminal laws that carry severe penalties, whether or not they were disclosed with consent. There is no historic exception to the First Amendment for a general restriction on truthful speech made without the consent of the subject of the speech, even if the speech is an image that is private, offensive, or humiliating.

Further, it is not clear that this cause of action is susceptible to a categorical definition since it depends on extrinsic facts that are not evident from the image itself, i.e., consent and a reasonable expectation of privacy in the creation of the image.

It is exceedingly unlikely that the Supreme Court will develop a new historic exception to the First Amendment for such private images distributed without consent. In recent years, the Supreme Court has repeatedly rejected requests that it find new exceptions, even for speech that many find offensive or of low value. See *Stevens*, 559 U.S. 460 (depictions of actual animal cruelty is an unconstitutional content-based restriction on speech.); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (regulation of video games with violent content); *Free Speech Coal.*, 535 U.S. 234 (computer-generated images that appear to be of a minor engaging in sex and images of an adult that appears to be a minor engaging in sexual activity even though the government argued that it was necessary to prevent fueling the market for pornography created using actual minors). See also *United States v. Alvarez*, 567 U.S. 709 (2012) (lying about receiving a military honor or commendation); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (sale of pharmaceutical data for commercial purposes); *Citizens United v. FEC*, 558 U.S. 310 (2010) (independent electioneering by corporations and unions); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (regulation of commercial and non-commercial signs).

Judicial Review Standard: Strict Scrutiny Test

If a content-based regulation of speech does not fit into a historic exception to the First Amendment, it must satisfy strict constitutional scrutiny. See *Playboy*, 529 U.S. at 813. In applying strict scrutiny, it is irrelevant that a law provides a civil cause of action rather than a criminal penalty. *Id.* at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); *Sorrell*,

564 U.S. at 566 (2011) (“Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.”) (internal citations omitted).

Strict scrutiny is strict in theory but fatal in fact: we found only one law restricting speech which had survived this gauntlet. See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). If a law is deemed to be a content-based restriction on speech, it is presumed to be unconstitutional. “[T]he Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000).” *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

To meet the test for strict scrutiny, the government must:

- (1) articulate a legitimate and compelling state interest;
- (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and,
- (3) show that the restriction is the least restrictive means to achieve that interest.

See *Playboy*, 529 U.S. at 813; *R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118. In *Brown*, the Supreme Court called this a “demanding standard. ‘It is rare that a regulation restricting speech because of its content will ever be permissible.’” 564 U.S. at 799 (internal citations omitted).

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as “a government objective of surpassing importance.” 458 U.S. at 757. In *Ashcroft v. Free Speech Coalition*, the Court rejected the government’s argument that a law criminalizing virtual child pornography was necessary because it whets the appetites of pedophiles and to dry up the market for actual child pornography. 535 U.S. at 253-4. In *Brown*, the Court rejected California’s argument that it must block minors’ access to video games with violent content to prevent them from committing future crimes. 564 U.S. at 798-803.

Application of the Legal Principles Described Above to the Draft Act

The draft act will likely fail this strict scrutiny analysis. The draft act effectuates no compelling state interest that can overcome the First Amendment. A legislature has a compelling interest in providing recourse to individuals who have been harassed or threatened, but the draft act has no element requiring that the defendant intended that any harm result from the disclosure or even that harm to the person in the image did in fact result. It contemplates statutory damages so there would be no need to show any harm at any stage of the proceeding. The cause of action is not even limited to the person in the image. Instead, it allows anyone who is “aggrieved” by the disclosure to bring a suit.

Compelling State Interest

While privacy is an important interest, the Supreme Court has repeatedly struck down civil and criminal penalties on speech about personal and sensitive information when First Amendment rights were at stake. In *Time, Inc. v. Hill*, the Supreme Court threw out an award for civil damages under New York's invasion of privacy law. 385 U.S. 374 (1967). In *Florida Star v. B.J.F.*, the court threw out a civil damages award against the Florida Star for publishing the name of a rape victim. 491 U.S. 524 (1989). See also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), the Supreme Court emphasized that this line of cases was not limited to information obtained from the government.

The Court has also held that mental suffering by the subject of speech from the publication of sensitive personal information does not satisfy strict scrutiny analysis. In *Simon & Schuster*, the Supreme Court considered whether New York's "Son of Sam" law was constitutional. The law required anyone who entered into a contract with a person who committed a crime for the story of the crime to pay the contractual compensation to the state restitution board to reimburse the victims of the crime. The Court held that even the emotional pain the crime victims must endure from the telling of what is often a very private and painful story does not overcome the First Amendment rights of the speaker or publisher even when the sanction is merely a financial penalty:

The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers... As we have often had occasion to repeat: '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' [citation omitted] . . . The Board thus does not assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization.

502 U.S. at 118. See also *Sorrell*, 564 U.S. at 576 ("Speech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain.' *Snyder v. Phelps*, 131 S. Ct. 1207, 1220")

Offense to the collective audience is also not enough to satisfy the compelling state interest test. The Supreme Court in *Texas v. Johnson* said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989) (internal citations omitted). See also *R.A.V.*, 505 U.S. at 377 (striking down a statute that limited speech that "arouses anger, alarm or resentment in others"); *Free Speech Coal.*, 535 U.S. at 245 ("It is also well established that speech may not be prohibited because it concerns subjects offending

our sensibilities.”) (internal citations omitted); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers”) (internal citations omitted); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (“[T]he fact that protected speech may be offensive to some does not justify its suppression”) (internal citations omitted); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it”).

Narrow Tailoring

Even assuming the privacy interest was enough to satisfy the compelling state interest portion of the strict scrutiny test, the draft act is not limited to that interest. See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.”). It is not limited to images that have not been previously disclosed, or even to those that have been disclosed to a spouse or significant other with the understanding that they be kept private. And, the cause of action is not limited to the person whose privacy has been violated. Other than the consent element, the only privacy limitation in the draft act is the affirmative defense but it apparently goes to the circumstances of the creation of the image, not whether it has subsequently been kept private. A picture can be widely published but the person depicted in it could still bring a cause of action because the privacy violation is in the creation of the image.

Similarly, the act is not narrowly tailored to the extent it applies to distribution of nonconsensual disclosures of images even where no harm results and absent the disseminator’s knowing and malicious intent to invade another’s privacy—or, in fact, any intent at all. Narrowing the legislation to disclosure of private images with an intent to harass, stalk, threaten, or cause similar serious harm, for example, would be narrowly tailored to address malicious invasions of privacy without burdening protected speech.

Knowledge and Intent

A crucial factor in assessing whether a statute’s reach is tailored to a proper government purpose is whether it is designed to target “bad actors” who understand and intend the consequences of their actions. Thus, a statute’s “knowledge” and “intent” elements play a crucial role in determining its constitutionality, as well as the availability of statutory damages and punitive damages. Courts have generally held that in order for speech to be penalized, the speaker must, at a minimum, know or intend that his speech will cause harm. In this way, *mens rea* serves as the “crucial element separating legal innocence from wrongful conduct.” *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). The draft act contains neither an intent nor an actual knowledge requirement, and we believe that this omission will make it difficult for a government to justify its broad reach if introduced as written.

In the First Amendment context, it is no exaggeration to say that the very limits of the government’s ability to legislate are defined by a speaker’s level of knowledge and

specific intent. For example, to lose its First Amendment protection as incitement, speech must be intended to persuade people to act lawlessly. *Hess v. Indiana*, 414 U.S. 105, 109 (1973). Criminal defamation laws may not punish speech “unless made with knowledge of their falsity or in reckless disregard of whether they are true or false.” *Garrison v. State of Louisiana*, 379 U.S. 64, 78 (1964). These parameters for constitutional protection apply fully in the civil context, where courts have upheld the same boundaries for First Amendment protection. See, e.g., *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987) (declining to relax criminal incitement standards in a civil case); *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S., 886, 928–29 (1982) (same); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1987) (holding that the First Amendment prohibits public figures from recovering for the tort of intentional infliction of emotional distress unless a statement is made with “actual malice”).

It is true that, unlike in criminal law, in the civil context actual knowledge standards may be relaxed for speech-related torts like defamation, so long as the law does “not impose liability without fault.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). *Gertz* is a case involving a defamation action brought by a private individual against a magazine that published falsehoods about him, and likely offers the most helpful analog in existing case law in determining how federal courts would assess a civil cause of action for nonconsensual images. In *Gertz*, the Court made clear that it would permit the states to set their own levels for injury to a private person’s reputation, so long as 1) such liability was not without fault, and 2) liability did not attach to people without meaningful notice of a statement’s defamatory content. The draft act fails the admonitions issued by the justices in *Gertz*.

First, and most crucially, the draft act imposes liability without fault. The operative language in the draft supports liability any time a person publishes an image when the person “should have known” that he or she lacked consent. “Should have” language is often referred to as a negligence standard. However, the way this language operates in the draft act, it amounts to no knowledge-based safeguard at all. Unlike the knowledge of “falsity” relevant to a defamation claim, consent is an affirmative act. See, e.g., *In re Commercial Fin. Servs., Inc.*, 252 B.R. 516, 521 (Bankr. N.D. Okla. 2000). This means that 100% of the time where there has been no initial consent to disclosure, a defendant “should know” of that lack of consent. As it is incumbent on legislators introducing a bill to explain its reach, we urge the Committee to fully explore this question with the act’s drafters: when is this “negligence” *not* satisfied in the absence of actual consent? Based on the text, and the fact that consent is affirmative, we cannot imagine that element ever failing to be satisfied.

But the “should have known” language would likely also fail constitutional scrutiny for a second reason. As the *Gertz* Court stated:

Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose *content did not warn a reasonably prudent editor or broadcaster of its defamatory potential*.

Gertz, 418 U.S. at 348 (emphasis added).

Much of the case law surrounding the requisite knowledge in speech-related torts comes from the doctrine of libel and defamation, as above—in which the government’s interest is in preventing lies that damage another’s reputation. Nonconsensual disclosure of intimate images, of course, is damaging precisely because of its accuracy; instead, the government’s legitimate interest in regulating it stems from the lack of consent to any discrete publication. Under the logic of *Gertz*, in order for any civil penalty to be consistent with the First Amendment, it can extend only to individuals who have some degree of notice that they actually lack consent to publish the image. As explained above, as everyone “should know” they lack affirmative consent to share an image whenever they don’t explicitly have it, it’s difficult to see how the draft act provides any notice about the scope of its “negligence”-based liability.

Overbreadth

In addition to our concerns about the draft act not being limited to malicious invasions of privacy, it is overbroad as the “public interest” exception fails adequately to exempt newsworthy, artistic, cultural, political, historical, and educational photographs. Even if a law satisfies strict scrutiny, it must still be reviewed for overbreadth so it does not sweep in a substantial amount of speech that is not the subject of the compelling state interest. “[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

The “public interest” affirmative defense is drafted so that the disclosure must be “made in the public interest.” This language focuses on whether the intent of the disclosure was in the public interest, rather than whether the disclosure itself was about a matter of public interest. This is problematic because, for example, the disclosures of former Congressman Anthony Weiner’s photos or the Abu Ghraib photos, while clearly newsworthy, could be thought by some not to be in the public interest due to their graphic nature or national security implications. The First Amendment will not tolerate the punishment of newsworthy or valuable speech—full stop, even in a civil context.

Public Policy Considerations

Beyond the constitutional considerations, we urge the Committee to seriously consider the public policy it wishes to effectuate—and ensure that the language of the draft act is consistent with those wishes. Is the Committee seeking to punish every teenager who has ever gone online and shared an image of nudity without permission? Such a scope would be impractical, damaging, and unfathomably massive. Yet the text as it stands—without requiring even the knowledge that a person is invading another’s privacy, let alone any intent to cause harm—permits just such an absurdly broad result.

We urge the Committee to focus this tort on those who knowingly and maliciously invade another's privacy, so it can be responsive to the individual horror stories put before the Committee. The current draft act contains no such safeguards, and penalizes fully innocent behavior far afield of such malicious and knowing acts.

Dated: November 13, 2017

Contacts:

Lee Rowland, ACLU (lrowland@aclu.org; 212-549-2606)

Sophia Cope, EFF (sophia@eff.org; 415-436-9333 ext. 155)

David Horowitz, Media Coalition (horowitz@mediacoalition.org; 212-587-4025 ext. 3)